

☒ Trademarks or ☐ Patents. (☐ the patent action involves 35 U.S.C. § 292.):

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

U.S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE #: 3:11-cv-00119-RET -DLD
Internal Use Only

Wildlife Outfitters, LLC v. Buckshot Products, LLC
Assigned to: Chief Judge Ralph E. Tyson
Referred to: Magistrate Judge Docia L Dalby
Cause: 28:2201 Declaratory Judgment

Date Filed: 03/02/2011
Jury Demand: Plaintiff
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

Plaintiff

Wildlife Outfitters, LLC

represented by **Robert C. Tucker**
Jones, Walker, Waechter, Poitevent, Carrere &
Denegre
8555 United Plaza Boulevard
5th Floor
Baton Rouge, LA 70809-7000
225-248-2098
Fax: 225-248-3098 FAX
Email: rtucker@joneswalker.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED




V.

Defendant

Buckshot Products, LLC

Date Filed	#	Docket Text
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03/02/2011 AM

03/02/2011	 <u>1</u>	COMPLAINT <i>For Declaratory Judgment</i> against All Defendants (Filing fee \$ 350 receipt number 053N-655044.), filed by Wildlife Outfitters, LLC. (Attachments: # <u>1</u> Attachment Civil Cover Sheet, # <u>2</u> Attachment Verification, # <u>3</u> Exhibit Exhibit A)(Tucker, Robert) (Entered: 03/02/2011)
03/02/2011		(Court only) *** Attorney Michael K. Leachman, Chad A. Grand for Wildlife Outfitters, LLC added. (JDL) (Entered: 03/03/2011)
03/03/2011	 <u>2</u>	NOTICE of Filing the Patent and Trademark Form (JDL) (Entered: 03/03/2011)

Case #: 3:11-cv-00119-RET-DLD

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WILDLIFE OUTFITTERS, LLC
Plaintiff

VERSUS

BUCKSHOT PRODUCTS, LLC
Defendant

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CIVIL ACTION NO.:

JUDGE:

MAG. JUDGE:

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, Wildlife Outfitters, LLC, for its complaint against defendant, Buckshot Products, LLC, represents the following:

Nature of Action

1.

This is an action for declaratory judgment under 28 U.S.C.A. §§ 2201, 2202, seeking a judgment of non-infringement of a trade dress purportedly owned by defendant Buckshot Products, LLC.

Factual Background

2.

Wildlife Outfitters, LLC ("Wildlife Outfitters") is a limited liability company organized under the laws of Louisiana with its principal place of business in Lafayette, Louisiana.

3.

Upon information and belief, Buckshot Products, LLC ("Buckshot Products") is a limited liability company organized under the laws of Indiana with its principal place of business in El Paso, Texas.

4.

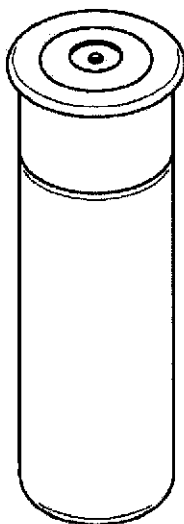
Wildlife Outfitters is the owner and developer of the WildLife Energy Drink™ and WildLife Energy Shots™—energy drinks developed for sportsmen. Wildlife Outfitters' WildLife Energy Drink™ is sold in 16-oz. cans that display one of three outdoor sports scenes: fishing, hunting or bow hunting. Wildlife Outfitters' WildLife Energy Shots™ are sold in containers shaped like a shotgun shell.

5.

Buckshot Products, through its affiliate Buckshot Enterprises, LLC, is the manufacturer and distributor of an energy drink called the "Buckshot Energy Shot." The Buckshot Energy Shot is also sold in a bottle in the shape of a shotgun shell.

6.

On January 9, 2008, Buck Ward ("Ward"), who upon information and belief is the owner of Buckshot Products, applied for a federal trade dress registration of its design for a bottle shaped like a shotgun shell:



The application was filed on an intent-to-use basis, with Ward seeking registration of the trade dress on the Principal Register of the United States Patent and Trademark Office (“USPTO”). However, in an office action issued on April 22, 2008, the USPTO refused registration because the applied-for trade dress was deemed to consist of a nondistinctive product design or nondistinctive features of a product design. The USPTO declared that the trade dress was not registrable on the Principal Register without sufficient proof of acquired distinctiveness. In response to the refusal, Ward amended his application to the Supplemental Register on August 6, 2009. On August 8, 2009, Ward assigned the trade dress to Buckshot Products. The trade dress was registered on the Supplemental Register on September 15, 2009 and was assigned U.S. Trademark Reg. No. 3,684,642.

7.

On February 21, 2011, Buckshot Products’ counsel, Mr. Hector Delgado, sent a cease and desist letter to Wildlife Outfitters, accusing Wildlife Outfitters of infringing Buckshot Products’ trade dress rights in a shotgun shell container for energy drinks. A copy of the February 21st letter is attached as Exhibit A. In the letter, Buckshot Products’ counsel advised that it would “associate Louisiana counsel and file a federal infringement lawsuit on or before Friday, March 11, 2011...seek[ing] compensation for unlicensed use, attorneys’ fees and costs, and a restraining order” if Wildlife Outfitters did not immediately cease and desist use of the shotgun shell container for its WildLife Energy ShotsTM product.

8.

As evidenced by the February 21, 2011, letter, an actual case or controversy has arisen between the parties. Wildlife Outfitters has a real and reasonable apprehension that its continuing actions will result in litigation being initiated by Buckshot Products. Thus, Wildlife

Outfitters has initiated this action for the purposes of seeking declaratory relief and resolution concerning its right to use a shotgun shell container in connection with its energy drinks in this state and country.

Jurisdiction and Venue

9.

This Court has subject matter jurisdiction under 28 U.S.C.A. §§ 1331 and 1338 because, among other things, the matter to be litigated raises one or more federal questions.

10.

This Court has personal jurisdiction over Buckshot Products because: i) Buckshot Products, upon information and belief, regularly and systematically transacts business in the State of Louisiana and this judicial district; and ii) a substantial part of the events or omissions giving rise to Buckshot Products' claims for trade dress infringement occurred in the State of Louisiana.

11.

Venue is proper under 28 U.S.C.A. § 1391(b)(1) since Buckshot Products is subject to personal jurisdiction in the Middle District of Louisiana and therefore is deemed to reside in this judicial district. Venue is also proper under 28 U.S.C.A. § 1391(b)(2) since a substantial part of the events or omissions giving rise to Buckshot Products' claims for trade dress infringement occurred in the Middle District of Louisiana.

COUNT I: Declaratory Judgment of Non-Infringement

12.

Wildlife Outfitters incorporates by reference its allegations in paragraphs 1–11 above.

13.

A shotgun shell container for a sportsman's energy drink is not inherently distinctive.

14.

Buckshot Products' shotgun shell container has not acquired distinctiveness through secondary meaning to be afforded trade dress protection under either §32 or §43 of the Lanham Act (15 U.S.C. 1114 and 15 U.S.C. 1125, respectively).

15.

Further, a shotgun shell container for energy drinks is functional and therefore not afforded trade dress protection under either §32 or §43 of the Lanham Act.

16.

Accordingly, Wildlife Outfitters' use of a container shaped like a shotgun shell for its energy drinks is not likely to cause confusion or mistake, or to deceive, as to the affiliation, connection, or association of Wildlife Outfitters with Buckshot Products, or as to the origin, sponsorship, or approval by Buckshot Products of Wildlife Outfitters' products.

JURY DEMAND

17.

Wildlife Outfitters demands a trial by jury on all issues so triable in the Complaint.

REMEDIES

WHEREFORE, the plaintiff Wildlife Outfitters seeks a declaration that:

- A. Its use of a container shaped like a shotgun shell for its energy drinks does not infringe on any valid rights that Buckshot Products claims to have in a shotgun shell container for energy drinks, including any rights represented by U.S. Trademark Reg. No. 3,684,642, or which may exist under the common law; and

- B. Wildlife Outfitters recover from defendant its attorney's fees and costs incurred in this action; and
- C. The Court order all legal, equitable, general, and other relief to which Wildlife Outfitters may be entitled.

Respectfully Submitted,

JONES, WALKER, WAECHTER, POITEVENT,
CARRERE & DENEGRÉ L.L.P.

Michael K. Leachman

Robert C. Tucker (LA Bar No. 2152)
Michael K. Leachman (LA Bar No. 30158)
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ATTORNEYS FOR PLAINTIFF,
WILDLIFE OUTFITTERS, LLC

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Wildlife Outfitters, LLC

(b) County of Residence of First Listed Plaintiff Lafayette
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Jones, Walker ** 8555 United Plaza Blvd., 5th Floor, Baton Rouge, Louisiana 70809 **** (225-248-2420)

DEFENDANTS

Buckshot Products, LLC

County of Residence of First Listed Defendant El Paso County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Hector DelGado, PLLC *** 1112 Montana Avenue, El Paso, Texas 79902-1440 (915-533-1810)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	FORFEITURE/PENALTY <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	BANKRUPTCY <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark	OTHER STATUTES <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C.A. 2201, 2202

Brief description of cause:
Declaratory Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

03/02/2011

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

VERIFICATION

STATE OF LOUISIANA

PARISH OF LAFAYETTE


JAMES J. DAVIDSON, IV, appeared before me and, after being duly sworn, stated under oath that he is a member and manager of Wildlife Outfitters, LLC, and that all the allegations in Wildlife Outfitters, LLC's Complaint for Declaratory Judgment are true and correct to the best of his knowledge, information, and belief.




JAMES J. DAVIDSON, IV

Sworn to and subscribed before me

this 02 day of March, 2011.



NOTARY PUBLIC
Philip A. Fontenot (887, #16918)
 OFFICIAL SEAL
PHILIP A. FONTENOT
NOTARY ID # 16918
NOTARY PUBLIC, ATTORNEY
ENTIRE STATE OF LOUISIANA
COMMISSIONED FOR LIFE

HECTOR DELGADO PLLC

1112 Montana Avenue El Paso, Texas 79902-1440 Telephone (915) 533-1810 Fax (915) 533-1841

February 21, 2010

Certified Mail Return Receipt Requested

Mr. James J. Davidson, III
Wildlife Outfitters, LLC
810 South Buchanan Street
Lafayette, Louisiana 70501

Ref: Infringement of Shotgun Shell Cartridge Container Trademark for Energy
Drinks - Serial #:77367234; Reg #: 3684642

Dear Mr. Davidson,

My law firm represents Buckshot Products, LLC ("Buckshot"), the owner of the referenced United States Patent and Trademark Office registered trademark (the "Shotgun Shell Container Trademark" or the "Mark"). The Mark is registered for energy drinks.

It has come to our attention that you are using the Mark without having obtained a license from Buckshot. The Mark consists of a configuration of a container for energy drink, which is in the overall shape of a shotgun shell, with a round bottle case that holds the energy drink and a lid that is in the shape of the brass head of a shotgun shell. I have attached a copy of the registration certificate for your information. Buck Ward, aka Colorado Buck, is a principal of Buckshot and he has assigned the Mark to Buckshot. The registered trademark protects Buckshot Products, LLC from infringement throughout all of the U.S. Placing your "Wildlife Energy Drink" trademark on the shotgun shell configured container does not prevent the infringement of Buckshot's Shotgun Shell Container Trademark. As you may know, using a registered trademark without a license to do so is a violation of U.S. trademark law, Title 17 of the United States Code.

EXHIBIT

A

Buckshot expressly reserves all its rights and remedies, but it has instructed me to advise you of two courses of action for your consideration:

A. You must immediately cease and desist use of the Mark and remove the product from your company's website and other means used to market and sell the product using the Mark. Note that ceasing use of the Mark does not absolve your company of its responsibility to pay for the use of the Mark that has occurred.

B. If you are interested in exploring a business solution you should contact Mr. Mike Franco at mfranco@buckshotenterprises.com or by phone at 915-204-1614.

In the meantime, Buckshot Products, LLC intends to protect its interests for the past and future use of the Mark.

If you for any reason believe that you are not infringing on the Mark, or feel that you need not compensate Buckshot for past or future use of the Mark, please have your attorney contact me before end of business Wednesday, March 2, 2010, by email at hdel@hector-delgado.com so we can discuss Buckshot's rights and forthcoming actions.

If I am not contacted by March 2, 2011, I will associate Louisiana counsel and file a federal infringement lawsuit on or before Friday, March 11, 2011, that will immediately require your company to cease selling product that is packaged using the Shotgun Shell Container Trademark. The lawsuit will seek compensation for unlicensed use, attorneys' fees and costs, and a restraining order.

I look forward to resolving this matter amicably.

Yours truly,



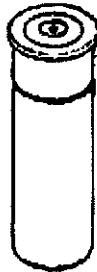
Hector Delgado

cc: Mike Franco, CEO, Buckshot Products, LLC (via email)
Colorado Buck, aka Buck Ward (via email)

Encl: Copy of Mark Registration

United States of America

United States Patent and Trademark Office



Reg. No. 3,684,642 WARD, BUCK (UNITED STATES INDIVIDUAL)
Registered Sep. 15, 2009 9500 FRISCO STREET, SUITE #34
FRISCO, TX 75094

Int. Cl.: 32 FOR: ENERGY DRINKS, IN CLASS 32 (U.S. CLS. 43, 46 AND 48)

TRADEMARK
SUPPLEMENTAL REGISTER

FIRST USE 2-1-2009, IN COMMERCE 2-1-2009.

THE MARK CONSISTS OF A CONFIGURATION OF THE CONTAINER FOR THE GOODS, WHICH IS IN THE OVERALL SHAPE OF A SHOTGUN SHELL, WITH A RIFLED CASE THAT HOLDS THE ENERGY DRINK AND A LID THAT IS IN THE SHAPE OF THE BRASS HEAD OF A SHOTGUN SHELL.

SER. NO. 77-367,334, FILED P.R. 1-9-2009, AM. S.R. 2-6-2009.

CLERK HERMAN, EXAMINING ATTORNEY



David J. Kypas

Attorney of the United States Patent and Trademark Office